

EXPLANATORY STATEMENT for
ASIC CORPORATIONS (SUPERANNUATION - ACCRUED
DEFAULT AMOUNT AND INTRA-FUND TRANSFERS)
INSTRUMENT 2016/64

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes this legislative instrument, ASIC Corporations (Superannuation - Accrued Default Amount and Intra-fund Transfers) Instrument 2016/64 (the **Instrument**), under subsection 1020F(1) of the *Corporations Act 2001* (the *Act*). Subsection 1020F(1) provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.9 or declare that Part 7.9 of the Act applies in relation to a person as if specified provisions were modified.

The Instrument remakes ASIC Class Order [CO 04/1574] - *Application form and cooling-off relief for certain transfers of members between financial products and interests within a superannuation fund* ([**CO 04/1574**]), which will cease to have effect, or to sunset, on 1 April 2016 under the *Legislative Instruments Act 2003*. The Instrument preserves the substance of the relief available under [CO 04/1574], extends the relief to the movement of an accrued default amount to a MySuper product and makes some non-substantive refinements to the terms of the relief.

1. Background

Scope of relief under [CO 04/1574]

On 2 March 2005, ASIC released IR 05-10 - *ASIC and APRA facilitate 'intra-fund' superannuation member benefit transfers* in which the issue of [CO 04/1574] was announced. [CO 14/1574] provided conditional relief from application form requirements and cooling-off rights for trustees of certain regulated superannuation funds in the circumstances of an 'intra-fund transfer' without the affected members' consent.

Application form requirements under s1016A(2) of the Act mean, in broad terms, that a financial product should be issued or sold only under an eligible application form that is included in, or accompanies, a Product Disclosure Statement, unless a situation covered by ss1016A(2)(b) to 1016A(2)(f) applies. In addition, s1019B(2) of the Act requires a cooling-off period to be provided when a financial product is issued or sold. During the 14-day cooling-off period, the client has the right to return the financial product and to have the money they paid to acquire the product repaid.

The relief under [CO 04/1574] was provided so that the application form and cooling-off requirements would not apply to an 'intra-fund transfer'. Without relief, the application form and cooling-off requirements would apply because reg 7.9.02(4) of the *Corporations Regulations 2001* (the **Corporations Regulations**) deems that there is an issue of a new interest in a superannuation fund where there is a change in the composition of a person's membership of one or more sub-plans within the fund. The principal reason for this deeming provision is that sub-plans often involve different rights and benefits.

In particular, reg 7.9.02(4) operates where:

- (a) the person is a member of a superannuation fund in relation to a sub-plan; and
- (b) either:
 - (i) the person's membership changes to membership in relation to another sub-plan; or
 - (ii) the person holds interests in 2 or more sub-plans at the same time.

The operation of reg 7.9.02(4) included an 'intra-fund transfer', which in broad terms is a change to the composition of a person's membership of a fund that involves a lawful transfer of membership from one part of the fund to another part of the fund without the member's consent where, as a result of the transfer, the member is conferred benefits that are equivalent to the benefits immediately before the transfer occurred. ASIC's view was that it was inappropriate in this scenario for the application form requirements and the cooling-off requirements to apply because the transfer would occur without the member's consent and the member would be adequately protected because there would be no reduction in the member's benefits.

Further, the exclusion of the application form and cooling-off requirements in the intra-fund transfer scenario would achieve an alignment with the legal position for an **inter-fund transfer** that is a successor fund transfer. A requirement of a successor fund transfer is that the new fund, or the transferee fund, must confer on the member equivalent rights to the rights that the member had under the original fund, or the transferor fund, in respect of the benefits of membership of the fund: see the definition of 'successor fund' in reg 1.03(1) of the *Superannuation Industry (Supervision) Regulations 1994* (the **SIS Regulations**). In relation to an inter-fund transfer that is a successor fund transfer, reg 7.9.04(1)(c) of the Corporations Regulations provides that the trustee of the new fund may give the member a Product Disclosure Statement for the new fund within 90 days after the interest in the new fund is issued. A flow-on effect of this provisions is that, for an inter-fund transfer that is a successor fund transfer, there is no requirement to give an application form to the member and the cooling-off rights are excluded.

Given that [CO 04/1574] will sunset on 1 April 2016, ASIC has remade [CO 04/1574] by continuing the relief and making some minor and technical changes to the terms of the relief.

Extension of relief to movements of accrued default amounts

After considering industry feedback, ASIC has extended the scope of the relief to the movement of an accrued default amount to a MySuper product. Under the Stronger Super reforms, a trustee must transfer all accrued default amounts to a MySuper product by 1 July 2017: s387 of the *Superannuation Industry (Supervision) Act 1993* (the **SIS Act**). The MySuper product may be in the same superannuation fund in which the accrued default amount is held, or the MySuper product may be in a different fund.

Under s20B of the SIS Act, an ‘accrued default amount’ is, for a member of a regulated superannuation fund, the amount of a member’s superannuation interests:

- (a) where the member has not given the trustee of the fund any direction about the investment option to be applied; or
- (b) that is invested in the ‘default’ investment option under the current governing rules of the fund (i.e. the investment option that would apply for a new member if no direction were given).

The question of whether a particular movement of an accrued default amount to a MySuper product in the same superannuation fund will be an intra-fund transfer will depend on the substantive nature of the change from the default environment to the MySuper product. In practice, such a movement is likely to be caught by one of the two limbs of the definition of intra-fund transfer under [CO 04/1574].

The concept of an intra-fund transfer is limited to a change to the composition of a member’s interest within the same superannuation fund. Therefore, the relief from the application form and cooling-off requirements under [CO 04/1574] was unavailable for the movement of an accrued default amount to a MySuper product in a different fund. In the normal scenario where a transfer to a MySuper product in a different fund will mean that an interest in the new fund is issued to the member, the application form and cooling-off requirements are likely to apply. No statutory exemptions are available in this scenario.

ASIC considers that the operation of the application form and cooling-off requirements under these circumstances is not appropriate. It may also confuse a member when an accrued default amount is transferred to a MySuper product. This is the case irrespective of whether the MySuper product is in a different superannuation fund or whether the transfer would satisfy the definition of an intra-fund transfer. The operation of the application form and cooling-off requirements is not appropriate for the following reasons:

- (a) the compulsory nature of the transfer means that the application form process serves no useful purpose and cooling-off rights are not relevant; and
- (b) members are adequately protected by transition disclosure regimes that are designed for the movement of an accrued default amount to a MySuper product—in addition, the movement may require a PDS to be given to the member, especially if the MySuper product is in a different superannuation fund.

ASIC has addressed the situation of accrued default amounts by expanding the scope of the relief to cover all movements of an accrued default amount to a MySuper product.

2. Purpose of the Instrument

The Instrument serves the following purposes:

- (a) continuing the relief under [CO 04/1574];
- (b) extending the scope of the relief to the movement of an accrued default amount to a MySuper product; and
- (c) making non-substantive changes to the terms of the relief.

The relief under [CO 04/1574] was based on the policy principles that, in a situation where an intra-fund transfer occurs lawfully without member consent and the member is conferred equivalent benefits as a result of the transfer, it is not appropriate for the trustee of the superannuation fund to be made subject to application form requirements and cooling-off requirements. After considering feedback from the consultation process, ASIC maintains its view that these underlying policy principles remain relevant and that the substantive effect of the relief under [CO 04/1574] should be continued in the Instrument. As explained, ASIC concluded that the scope of the relief should be extended to apply to the movement of an accrued default amount to a MySuper product.

Further, ASIC considered that some minor and technical changes to the terms of the relief were necessary to reflect legislative changes that occurred after [CO 04/1574] was issued.

3. Operation of the Instrument

Accrued default amount transfers

Subparagraph 5(1) of the Instrument provides an exemption from the application form requirement under section 1016A to the movement of an accrued default amount to a

MySuper product. This relief applies irrespective of whether the attribution or transfer is an intra-fund transfer.

The Instrument provides relief from the cooling-off requirements for an accrued default amount attribution or transfer to a MySuper product: see s1019A(1A)(a) of the Act, as inserted by paragraph 6 of the Instrument. In contrast to other kinds of intra-fund transfers, the scope of this relief is not subject to the pre-conditions set out in s1019A(1B) of the Act, as inserted by paragraph 6 of the Instrument.

The application form and cooling-off relief provided to the movement of an accrued default amount to a MySuper product will apply regardless of whether the MySuper product is in a different fund. The definition of ‘intra-fund transfer’ in the Instrument is not relevant to the relief for accrued default amount movements.

Other intra-fund transfers

Application form relief

Subparagraph 5(2) of the Instrument provides an exemption from the application form requirement for any other kind of intra-fund transfer. This head of relief is limited to the circumstances in which cooling-off relief is available in relation to an intra-fund transfer.

Cooling-off relief – General

The Instrument provides relief from the cooling-off requirements for any other kind of intra-fund transfer: see s1019A(1A)(b) of the Act, as inserted by paragraph 6 of the Instrument. In this context, any other kind of intra-fund transfer means an intra-fund transfer that is not an attribution or transfer of an accrued default amount to a MySuper product.

The cooling-off relief is subject to the pre-conditions set out in s1019A(1B) of the Act, as inserted by paragraph 6 of the Instrument. For the most part, these pre-conditions mirror the corresponding requirements in [CO 04/1574] for an intra-fund transfer.

Cooling-off relief – Pre-conditions

The first pre-condition in s1019A(1B) includes a requirement that the trustee hold an RSE licence: refer to s1019A(1B)(a). The term ‘RSE licence’ is defined in paragraph 6 of the Instrument to mean a licence that is granted under section 29D of the SIS Act. Under section 29D of the SIS Act, APRA may grant a licence to an entity to allow it to be the trustee of a superannuation fund. Previously, this element of paragraph 4 of [CO 04/1574] stated that the trustee must either hold an RSE licence or be an approved trustee. ‘Approved trustee’ was defined in paragraph 5 of [CO 04/1574] to mean ‘approved trustee’ as defined in s10(1) of the SIS Act. However, the definition of ‘approved trustee’ in s10(1) of the SIS Act was repealed by the *Superannuation Safety Amendment Act 2004*. This repeal took effect on 1 July 2006. As a result of the repeal of the definition of ‘approved trustee’, the concept of an ‘approved trustee’ was not included in the Instrument. Further, in subparagraph (4)(b) of [CO 04/1574], the opening text was: ‘The RSE licence or the approval as an approved trustee (as

relevant)'. Flowing from the non-inclusion of the concept of an approved trustee in the Instrument, these words were not retained in the Instrument.

Aside from this change to the first pre-condition, the other pre-conditions of the cooling-off relief substantively replicate the corresponding requirements in [CO 04/1574]. In particular, the Instrument continues to apply the requirements that were set out in subparagraph (4)(b) of [CO 04/1574] about the conditions to which the trustee's RSE licence must be subject: refer to ss1019A(1B)(a)(i) and 1019A(1B)(b), as inserted by paragraph 6 of the Instrument. A required condition of the licence is that the governing rules of the fund must provide that an intra-fund transfer without member consent is not allowed unless one of the following limbs (the *Alternate Limbs*) applies:

- (a) the transfer is to a section, division or plan of the fund which confers on the member equivalent rights to the rights that the member had under the original section, division or plan in respect of the benefits; or
- (b) the transfer could have lawfully been made, in the absence of the Instrument, been made without member consent.

Another requirement is that the trustee's RSE licence must be subject to a condition that the trustee must not transfer the benefit of a member by an intra-fund transfer unless the member consents or the transfer satisfies one of the Alternate Limbs: see s1019A(1B)(a)(ii), as inserted by paragraph 6 of the Instrument.

The intra-fund transfer must occur without the member's consent: see s1019A(1B)(c), as inserted by paragraph 6 of the Instrument. The trustee must take all reasonable steps to ensure that the intra-fund transfer satisfied one of the Alternate Limbs: s1019A(1B)(d)(i), as inserted by paragraph 6 of the Instrument. Another requirement is that, after the transfer from a part of the fund to another part of the fund occurs, there are no interests remaining in the original part of the fund and no further interests in that part of the fund are issued: s1019A(1B)(d)(ii), as inserted by paragraph 6 of the Instrument.

The final requirement of the Instrument is that the trustee must take all reasonable steps to ensure that at least 30 days before the superannuation product is issued to a member in the course of the intra-fund transfer, the member is given a significant event notice under section 1017B of the Act and a Product Disclosure Statement for the product: s1019A(1B)(d)(iii), as inserted by paragraph 6 of the Instrument.

Cooling-off relief – Definitions

Paragraph 6 of the Instrument also inserts some definitions for the purposes of ss1019A(1A) and 1019A(1B) of the Act. The definition of an 'intra-fund transfer' under the Instrument is in the same terms as the definition in paragraph 5 of [CO 04/1574]. In relation to a regulated superannuation fund, an 'intra-fund transfer' means:

- (a) a disposal of an interest in the fund and the acquisition of an interest in the fund of a different class in substitution for the interest disposed of; or
- (b) any other circumstance where a person's membership of the fund in relation to a financial product or a sub-plan changes to membership of the fund in relation to another financial product or another sub-plan.

The scope of this definition includes a change to the composition of a member's interest in the fund to which there would be a deemed issue of a superannuation product under reg 7.9.02(4).

4. Consultation

In June 2015, we released ASIC Consultation Paper 232 – *Remaking ASIC Class Orders on superannuation: [CO 04/1574] and [CO 06/636]*. This Consultation Paper dealt with two superannuation related Class Orders, [CO 04/1574] and [CO 06/636] – *Superannuation: Delivery of product disclosure for investment strategies ([CO 06/636])*, that were due to lapse in 2016. For both [CO 04/1574] and [CO 06/636], we proposed in the Consultation Paper to remake the instruments with non-fundamental changes.

We received feedback from the Consultation Paper. The submissions raised a range of issues, including aspects that led to ASIC considering the extension of the relief under [CO 04/1574] to accrued default amount movements. None of the submissions objected to ASIC's proposals to continue the relief under the terms of the Instrument.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

ASIC Corporations (Superannuation - Accrued Default Amount and Intra-fund Transfers) Instrument 2016/64 (the **Instrument)**

The Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

The Instrument modifies the application form and cooling-off period requirements in Part 7.9 of the Corporations Act 2001 in the situation where a superannuation trustee of a regulated superannuation fund moves or attributes an accrued default amount to a MySuper product or another kind of transfer within the fund occurs.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.